



# THE ATTORNEY GENERAL OF TEXAS

GERALD C. MANN  
~~WILLIAMSON~~  
ATTORNEY GENERAL

AUSTIN 11, TEXAS

Mr. C. D. Simmons, Comptroller  
University of Texas  
Austin, Texas

Dear Mr. Simmons:

Opinion No. 0-2716  
Re: Authority of Board for Lease  
of University Lands to offer  
and sell gas rights only in  
University lands.

Your letter of October 22, 1940, requests the opinion of this department as to whether or not the Board for Lease of University Lands is authorized to offer for sale and to sell the gas rights only in certain tracts of University lands, without offering at the same time to sell oil leases upon such land.

The authority of the Board to offer for sale and to sell oil and gas in University lands is found in Chapter 148 of the Acts of 1937, Article 2603a, Vernon's Annotated Civil Statutes, which Act amends Chapter 282 of the Acts of 1929, and Chapter 174 of the Acts of 1931.

Section 4 of Article 2603a provides, in part, as follows:

"Whenever there shall be such demand for the purchase of oil and gas in any University land as will reasonably insure that said oil and gas may be sold advantageously, the Board shall place said oil and gas in said lands on the market in separate tracts of such area and extent as the Board may determine most suitable for the profitable marketing thereof, but in no event shall any tract in which oil and gas is offered for sale as a unit exceed an area of six thousand (6,000) acres. The sale of said oil and gas shall be made at public auction and shall be held in Austin, Texas, at any hour between ten o'clock A.M. and five o'clock P.M. The Board shall cause to be advertised a brief description of the lands upon which the oil and gas is proposed to be sold, . . . ."  
(Underscoring ours).

Section 5, in part, provides as follows:

"The oil and gas in each tract shall be offered for sale for a bonus in addition to the stipulated royalty. Each tract shall be offered separately. Each bid shall be subject to such royalty as is specified in the official advertisement preceding the sale, but in no event shall be less than one-eighth of the gross production of oil and gas in the land; . . . ." (Underscoring ours)

Section 7 provides:

"If any one of the bidders at the sale at public auction shall have offered a reasonable and proper price for any tract offered not less than the price fixed by the Board, the land advertised may be leased for oil and gas purposes under the terms of this Act and such regulations as the Board may prescribe, not inconsistent with the provisions of this Act. All bids may be rejected by the Board." (Underscoring ours).

Section 8 provides, in part, as follows:

"(a) If the Board shall determine that a satisfactory bid has been offered for said oil and gas, it will make an award to the bidder offering the highest price therefor, and a lease shall be executed by the Commissioner of the General Land Office, a duplicate copy of such lease to be filed in the General Land Office.

"(b) The primary term of the lease, as determined by the Board prior to the promulgation of the advertisement, shall in no case exceed five (5) years, and each lease shall provide that the lease shall terminate at the expiration of its primary term, and shall provide that if oil and/or gas is being produced in paying quantities from the premises before termination of the primary term, said lease shall continue in force and effect as long as such oil and/or gas is being so produced. The lease shall include such additional provisions and regulations, not inconsistent with the provisions of this Act, as the Board may prescribe to preserve the interests of the State and safeguard the University funds." (Underscoring ours).

It will be noted that this statute, in Section 4, au-

thorizes the Board, in certain circumstances, to place 'oil and gas' on the market; that the tracts in which 'oil and gas' is offered for sale shall not exceed 6,000 acres and that the 'oil and gas' shall be sold at public auction.

In Section 4, it is provided that the 'oil and gas' shall be offered for sale for a bonus; that the royalty shall not be less than 1/8th of the gross production of 'oil and gas' in the land.

Section 7 provides that under certain conditions the land advertised may be leased for 'oil and gas' purposes.

In Section 8, provision is made for execution of leases if the Board determines that a satisfactory bid has been offered for said 'oil and gas', and that such lease shall provide that if oil and/or gas is being produced in paying quantities, before termination of the primary term, said lease shall continue in force and effect so long as such oil and/or gas is being so produced.

We recognize the rule of statutory construction which permits the word "and" to be held as having been used in the disjunctive as well as the conjunctive sense when the purpose sought to be accomplished by the Legislature is thereby effected. In Chapter 148, however, the Legislature, while expressly resorting to use of the phrase and/or in Section 8 (b), where provision is made for keeping the lease alive during the production of either oil or gas, failed to use such term in providing for the offering for sale, the advertisement, the sale of leases, and the bonus and royalty to be paid. The fact that the Legislature in one section of the statute used the definite term "and/or", whereas in other sections of the same statute such term was not used, but instead the conjunctive "and" was used is, to us, highly persuasive against a construction of the statute in a manner which would result in giving the same meaning to the word "and" in Sections 4, 5 and 7, as must, perforce the express wording of the statute, be given to the phrase "and/or" in Section 8.

Furthermore, viewing the consequences of the two possible constructions of the statute, as it is permissible to do when the language used is not entirely plain - *Oriental Hotel Company v. Griffiths*, 88 Tex. 574, it is apparent that if Sections 4, 5 and 7 of the statutes be construed to authorize leases for either oil or gas, results will thereby be occasioned which were plainly not intended by the Legislature. To illustrate, - Assume a lease is made for gas only on a tract of land. In the process of drilling for gas, oil is discovered in paying quantities, which oil flows without the necessity

of pumping. Under a lease limited to gas alone, no royalty for the oil produced would be provided for, nor any obligations or covenants on the part of the gas lessee with respect to the production of oil. If, however, oil is produced in paying quantities, the gas lease, by virtue of the express provisions of Section 8 (b), is continued in force beyond its primary term even though gas is not produced in paying quantities.

We think it plain that no such results were intended by the Legislature. Instead, we believe the Legislature intended that the oil and the gas in a specific tract of land should be offered for sale together, not each mineral separately; that the cash payment - the bonus - should be bid and paid for both the oil and gas, not for oil alone or gas alone; that the lease should cover both the oil and the gas and, by virtue of Section 8 (b), that the discovery and continued production of either oil or gas will operate to continue the lease in force on both oil and gas for as long as either oil or gas is so produced, subject, of course, to the fulfillment by the lessee of all the covenants and obligations of his lease.

Accordingly, you are advised that it is our opinion that the Board for Lease of University Lands is not authorized to offer for sale or to sell the gas only in University lands.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By s/Robert E. Kepke  
Robert E. Kepke  
Assistant

REK:BT:wc

APPROVED OCT 30, 1940  
s/Gerald C. Mann  
ATTORNEY GENERAL OF TEXAS

Approved Opinion Committee By s/BWB Chairman